



## Notre Dame Law Review

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Volume 37 | Issue 5

Article 1

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8-1-1962

# Three L's--Law Labor Liberty

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### Recommended Citation

Maurice H. Merrill, *Three L's--Law Labor Liberty*, 37 Notre Dame L. Rev. 589 (1962).

Available at: <http://scholarship.law.nd.edu/ndlr/vol37/iss5/1>

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## THE THREE L'S — LAW, LABOR, LIBERTY

*Maurice H. Merrill\**1. *Preliminary Survey*

In supporting congressional authorization for union shop agreements between railroads and the bargaining agents of their employees, Mr. Justice Douglas of the Supreme Court of the United States said that this presented "no more of an infringement or impairment of first amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."<sup>1</sup> Five years and many words later, he declared "the analogy fails."<sup>2</sup> The discovery of failure had no effect upon the views of the learned Justice respecting legislative competence to sanction union shops. He adhered to the views expressed in his opinion for the Court upholding that power.<sup>3</sup> Instead his view apparently was that, in distinction to compulsory unionism's promotion of "the well-established institution of collective bargaining as one of the means of preserving industrial peace,"<sup>4</sup> the integrated bar is a "guild"<sup>5</sup> which marshals its members "into goose-stepping brigades."<sup>6</sup>

This further reflection was forced upon Mr. Justice Douglas by litigants who took up the issue, reserved in the prior decision, of compulsory membership as "a cover for forcing ideological conformity or other action in contravention of the First Amendment."<sup>7</sup> These protagonists emphasized their objections to the expenditure of their dues for the advancement of unspecified but, allegedly, to them, obnoxious, opinions and proposals for governmental action on ques-

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1 See *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 238 (1956).

2 *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961) (dissenting opinion).

3 *International Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961) (concurring opinion).

4 *Lathrop v. Donohue*, 367 U.S. 820, 880 (1961) (dissenting opinion).

5 *Id.* at 878.

6 *Id.* at 884.

7 *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 238 (1956).

tions of public importance.<sup>8</sup> Thereby, they split into many splinters what the *Hanson* decision had indicated was a sturdy, scatheless and unific bench.<sup>9</sup> As a result, only by Mr. Justice Douglas' deference to "the practical problem of mustering five Justices for a judgment,"<sup>10</sup> and by putting the decision upon statutory rather than upon constitutional grounds, was it possible to produce an opinion of the Court in respect to the use of union dues. As to the integrated bar, the views were so disparate that no majority opinion could be constructed. Mr. Justice Black acerbically commented upon the difficulty of determining the effect of the decision.<sup>11</sup> In each case, the basic constitutional problems were left undecided, despite the devotion to the discussion of over 144 pages of the United States Reports, including opinions written by a total of six judges. In this posture of the decisional law, discussion of the constitutional issues seems justified.

Preliminarily, we should survey the constitutional provisions over the meaning of which the contests rage. Questions concerning the authority of Congress to legislate concerning the conditions of labor upon the nation's railroads obviously do not arise. That issue was settled long ago.<sup>12</sup> No subsequently intervening circumstances suggest the possibility of successful challenge to this application of the federal commerce power as supported by the necessary and proper clause.<sup>13</sup> The question, rather, is whether some substantive constitutional restriction upon the power of the national legislature has been violated. As to the states, of course, the problem for the national judiciary revolves solely about federal constitutional limitations.

As to nation and state alike, the current controversies center on the application of the guaranties respecting freedom, in one form or another.<sup>14</sup> With reference to the federal power, there is the first amendment's prohibition that Congress "make no law . . . abridging the freedom of speech, or of the press. . . ." More significant still, because of wider possibility of application, are the broad prescriptions of the fifth amendment, "nor shall any person . . . be deprived of . . . liberty . . . without due process of law . . .," and the parallel prohibition against the states contained in the fourteenth amendment. This wider applicability of the fifth and fourteenth amendments arises from the fact that it is liberty of all kinds, not merely of speech or of the press, that they protect, coupled with the doctrinal development whereby due process of law means not merely compliance with established and decorous forms of procedure but,

8 *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

9 It seems unlikely that the intervening succession of Justices Minton, Reed and Burton by Justices Brennan, Whittaker and Stewart is an appreciable factor in the splintering process. The continuing members of the court differ as widely in their positions as do the new threesome.

10 *International Ass'n of Machinists v. Street*, 367 U.S. 740, 778-79 (1961) (concurring opinion).

11 "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case — certainly I do not." *Lathrop v. Donohue*, 367 U.S. 820, 865 (1961) (dissenting opinion).

12 *Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930); *Wilson v. New*, 243 U.S. 332 (1917).

13 See *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

14 No doubt, in certain circumstances, a question concerning the equal protection of the laws, under the fourteenth amendment, might arise as against the states. To date, this has not been involved in the contest concerning the validity of state integrated bars.

as well, protection of "the very substance of individual rights to life, liberty, and property" as against "arbitrary legislation."<sup>15</sup>

It is true, of course, that there is a tendency, unfortunately supported by some judicial usage, to speak loosely of certain portions of the first eight amendments, and particularly, of the first amendment, as having been incorporated as limitations on the states by the due process clause of the fourteenth amendment.<sup>16</sup> This seems to me an intellectual standing broad jump of no mean proportions. The least degree of respect for written law as an exercise in the communication of ideas requires that the due process of law clauses of the fifth and the fourteenth amendments be treated as imposing similar restraints upon the governmental units to which, respectively, they are addressed.<sup>17</sup> And a like respect requires that the first amendment's protections should not be regarded as completely comprehended within the due process clause of the fifth amendment.<sup>18</sup> The truth is that the opinion in the case which initially accepted the view that fourteenth amendment liberty included free speech did not say at all that it incorporated the first amendment.<sup>19</sup> The language to that effect later employed by the Court may be merely careless. It also may be an attempt to carry over into the application of the fourteenth amendment the same sharpness of limitation that some find in the negative imperatives of the first amendment. Mr. Justice Holmes, although he thought that the fourteenth amendment limitation should have brought reversal in the *Gillow* case, made no such identification of the two amendments.<sup>20</sup> It may be that in application the scope of the two provisions does not differ widely, since the "clear and present danger test" under the first amendment has been watered down by the late decisions.<sup>21</sup> Still, there remains the possibility that an abridgment of freedom of speech in violation of the first amendment might not be so arbitrary as to contravene the requirements of due process of law.<sup>22</sup> We should hold this in mind, as we consider the various "liberties" which may be affected, in one way or another, by compulsory unionism or by integration of the bar.

15 *Hurtado v. California*, 110 U.S. 516, 532 (1884).

16 "And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) . . ." *Illinois ex. rel. McCollum v. Board of Education*, 333 U.S. 203, 210 (1948) (Black, J.). Still more regrettable is the next step, to make the simple inquiry, "whether New York . . . has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment," without any reference whatever to the fourteenth. *Zorach v. Clauson*, 343 U.S. 306, 310 (1952) (Douglas, J.).

17 See *Betts v. Brady*, 316 U.S. 455, 462 (1942); *United States v. Pink*, 315 U.S. 203, 228 (1942); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Hibben v. Smith*, 191 U.S. 310, 325 (1903).

18 Cf. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 441, 463 (1926).

19 *Gillow v. New York*, 268 U.S. 652, 666 (1925). The Court stated that freedom of speech and of the press "are among the . . . 'liberties' protected by the due process clause of the Fourteenth Amendment. . . ."

20 *Id.* at 672 (dissenting opinion).

21 *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Dennis v. United States*, 341 U.S. 494 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

22 See the excellent discussion of this point in Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167, 176 (1961).

## 2. *Liberty of Solitude*

When a Daniel Boone or a Montford Johnson found that the neighbors were crowding him too closely, his problem could be solved by moving on into still unoccupied territory.<sup>23</sup> Even in Massachusetts in the nineteenth century, Thoreau could retire to the shores of Walden Pond, but he could not escape the taxgatherer. Today, the seceder from society must go to harsh climates and inhospitable lands to escape from his fellows. Even there, he is apt to find the law impinging upon his enjoyment of the wilderness.<sup>24</sup> In any event, the society he has scorned is likely to envelop him with radioactive currents against which remoteness is no defense. The day for solitude as a way of life is past, and the Constitution cannot help it.

Physical solitude, however, is not the real objective of most people in our present age. The "lone wolves" want to remain in society. They want jobs. They want access to the various amenities of our communities. Their plaint is that they want all this on their own terms. Obviously, the request is impossible to grant. Our constitutional guaranties never have been so read.<sup>25</sup> Under them, "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."<sup>26</sup> Liberty, then, generally is subject to being defined and limited by the balancing of social and of individual interests.<sup>27</sup> While "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . .,"<sup>28</sup> and of the fourteenth too, "there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society."<sup>29</sup> In accordance with these general principles, subscribed to by judges of diversified times and temperaments, the Supreme Court repeatedly has upheld requirements that practitioners of particular occupations enroll, establish their skill in various ways, and pay fees to support the official

23 See JOHNSON, *THE CHICKASAW RANCHER*, 109 (1961).

24 *Perko v. United States*, 204 F.2d 446 (8th Cir. 1953), *cert. denied*, 346 U.S. 832 (1953); *United States v. Perko*, 133 F. Supp. 564 (D. Minn. 1955); *Bydion v. U. S.*, 175 F. Supp. 891 (Ct. Cl. 1959).

25 We are not prepared to admit that a minority . . . enjoying the general protection afforded by an organized local government, may . . . defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. *Jacobson v. Massachusetts*, 197 U.S. 11, 37-38 (1905) (Harlan, J.).

26 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (Hughes, C. J.).

27 "Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 157 (1931) (Stone, J.). The same distinguished jurist reminded us that where "the means chosen are appropriate to the permissible end, there is little scope for the operation of the due process clause." *Virginian Ry. Co. v. System Federation No. 40, Ry. Employees' Dep't.*, 300 U.S. 515, 558, (1937).

28 *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

29 *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

regulation of their vocations.<sup>30</sup> Liberty of solitude in one's calling is not part of our constitutional birthright. This much even Mr. Justice Douglas conceded.<sup>31</sup> It is compulsory membership in an organization to which he objects.

### 3. *Liberty to Stand Alone*

"Dare to be a Daniel! Dare to stand alone!" This part of the refrain from a gospel hymn of the last century comes back from the memories of my childhood with a compelling sense of its fitness to invoke the value which lies back of the doubt that troubles Mr. Justice Douglas in respect to the integrated bar, and that troubles others about compulsory unionism. We took our start, in large measure, from dissent and from the migration of those who found it impossible to dissent at home. Therefore, high on the list of the varieties of freedom grouped under our great constitutional concept of Liberty should be the liberty to stand alone, "freedom not to associate," as one court has put it.<sup>32</sup>

We have seen, however, that all these freedoms are relative. It becomes appropriate, therefore, to subject the restriction upon freedom to stand alone involved in compulsory membership in labor unions and in bar associations to analysis, in order to determine the objectives of the legislation and the comparative weight of *these* social purposes in relation to the restriction imposed by the legislation.

The objective of the legislation permitting union shop agreements<sup>33</sup> is to promote the collective bargaining process in industry, viewed by Congress as a means of harmonizing and stabilizing the operation of industry as an instrument of national commerce. The constitutional propriety of this objective long has been recognized.<sup>34</sup> The particular means by which it is here to be promoted is the requirement that all employees may be bound by contract, between the employer and the union which has achieved collective bargaining status, to become members of that union, thus doing away with the threat to effective bargaining posed by the existence of a large minority of "free riders" who get the benefit of the bargaining without sharing any of its cost.<sup>35</sup> The burden of this contribution is limited by the restriction to "periodic dues, initiation fees and assessments (not including fines and penalties)" which must be fixed on "the same terms and conditions as are generally applicable to any other member,"<sup>36</sup> The reasonable relationship of means to objective stands adjudicated,<sup>37</sup>

30 *Graves v. Minnesota*, 272 U.S. 425 (1926); *Douglas v. Noble*, 261 U.S. 165 (1923) (dentistry); *Watson v. Maryland*, 218 U.S. 173 (1910) (medicine); *Dent v. West Virginia*, *supra* note 29 (medicine). Cf. *Lehman v. State Board of Public Accountancy*, 263 U.S. 394 (1923) (accountancy).

31 See *Lathrop v. Donohue*, 367 U.S. 820, 878 (dissenting opinion).

32 *Pappas v. Stacey*, 151 Me. 36, 116 A.2d 497, 500 (1955).

33 See 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

34 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Virginian Ry. Co. v. System Federation No. 40, Ry. Employees' Dep't*, 300 U.S. 515 (1937); *Texas & N.O.R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

35 See *McConkey, Was the Agency Shop Prematurely Scrapped?*, 9 LAB. L. J. 150 (1958), for a short statement of this position.

36 64 Stat. 1238 (1951), 45 U.S.C. § 152, Eleventh (1958).

37 "To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce." Douglas, J., speaking for the court in *Railway Employees' Dep't v. Hanson* 351 U.S. 225, 235 (1956).

and indeed it is difficult to see how, rationally, it could be denied. The constitutional defects, if any, must be found at the third step of due process analysis — the possibility of interference with too many legitimate interests of those affected by the requirement.

When we turn to the integrated bar, the social objectives become more complex. Many have been enumerated: facilitation of the needed discipline of unworthy members;<sup>38</sup> betterment of the profession through improvement of its economic status; increased capacity for public service through various educational activities; facilitation of control over unauthorized practice by persons not subject to professional responsibility; the bettering of public relations, including the enlightenment of laymen as to matters of concern to them; discussion and promotion of reform in legal procedure, the administration of justice and in the substantive law.<sup>39</sup>

All these certainly seem to fall within the scope of legitimate social objectives. Mr. Justice Douglas apparently has some reservations. He referred to the Wisconsin brand of integration as having "the mark of 'a lawyer class or caste' — the system of 'a self-governing and self-disciplining bar' such as England has."<sup>40</sup> He seems also to think that there is danger of the policing of the lawyers by their own competitors. Thus he said, in a footnote, that a "self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, state constitutions the type of problem presented in *Schechter Corp. v. United States*, 295 U.S. 495."<sup>41</sup> The meaning of this reference is obscure. The case cited turned upon the lack of any meaningful standards to guide the exercise of the power delegated, a power vested not in competitors but in no lower an officer than the President of the United States. A more appropriate citation would have been to the *Carter* case, with its principle that "in the very nature of things, one person may not be entrusted with the power to regulate the business of another and especially of a competitor."<sup>42</sup> But, to repeat other words of Mr. Justice Douglas, already quoted, "the analogy fails." In the first place, the activities of integrated bars in respect to discipline are exercised by persons having official standing under rules of court, not by lawyers in their individual capacity.<sup>43</sup> In the second place the ultimate authority to impose discipline normally is exercised by the courts themselves. The lawyers do not disbar their fellows. In a few instances, preliminary authority to enter disciplinary orders has been vested in tribunals formed from members of the bar, but this has been safeguarded by the revisory power of the judiciary. State

38 The advantage of cooperation of bench and bar in professional discipline was stressed in *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937).

39 Most of these were adverted to in the Wisconsin Supreme Court's opinion in *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960).

40 *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (dissenting opinion). In the next breath Justice Douglas declared, "The pattern of this legislation is regimentation."

41 *Lathrop v. Donohue*, *supra* note 40, at 878 n. 1.

42 *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

43 As to Wisconsin, see *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404, 414 (1960). As to Oklahoma, see Art. VII, *Revised Rules Creating, Controlling and Regulating the Oklahoma Bar Association*, 33 OKLA. BAR ASS'N J. 135, 140 (1962). This point is emphasized in the concurring opinion of Harlan, J., in *Lathrop v. Donohue*, 367 U.S. 820, 854 (1961).

decision has considered this sufficient to safeguard against abuse.<sup>44</sup> In other areas of human behavior, the Supreme Court of the United States has placed like confidence in the effectiveness of judicial review.<sup>45</sup>

It may well be that Mr. Justice Douglas entertains doubt concerning the legitimacy of the alleged public interest in some activities of integrated bars. He recited:

It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." State Bar of Wisconsin, Rule 1, § 2. In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession. Thus, the Bar has compiled and published a schedule of recommended minimum fees. See Wis. Bar Bull., Aug. 1960, p. 40. Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within "the proper scope of the practice of law." State Bar of Wisconsin, By-Laws, Art. IV, §§ 8, 11.<sup>46</sup>

Later he remarked that "the present association" cannot "be defended on grounds that it renders only public services,"<sup>47</sup> stating that this objection might not be relevant were the law in issue one, for example, which required lawyers to contribute to a fund to protect clients whose attorneys turned out to be embezzlers. There is implicit the suggestion, therefore, that a state may not constitutionally interest itself in advancing the material prosperity of a group as a means to enable that group better to perform its obligations of public service. Intellectually, something might be said for this. But to sustain it as a legal proposition would require the abandonment of a long-established American tradition, going back to the very foundation of the government.<sup>48</sup> It would command the overruling, as we have seen, of well-established precedents. Of course, this by itself is not an invincible answer to any proposition of constitutional law. But it does suggest that acceptance of the proposition to which it applies should rest on careful exploration. There is no indication that the Supreme Court is about to embark upon such an exploration. Even the other dissenter in *Lathrop*, Mr. Justice Black, was prepared to assent that the integrated bar "does . . . provide many useful and entirely lawful services."<sup>49</sup> Mr. Justice Brennan, speaking for himself and three other Justices, after surveying these activities in detail, including those upon which Mr. Justice Douglas animadverted, said that "the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State. . . ."<sup>50</sup> "It cannot be denied," he concluded, "that this is a legitimate end of state policy."<sup>51</sup> Mr. Justice Harlan, who

44 *E.g.*, State Bar of Oklahoma v. McGhee, 148 Okla. 219, 298 Pac. 580 (1927).

45 *E.g.*, New York v. Van de Carr, 199 U.S. 552 (1905).

46 *Lathrop v. Donohue*, 367 U.S. 820, 880 (1961) (dissenting opinion).

47 *Id.* at 881.

48 HAMILTON, REPORT ON THE SUBJECT OF MANUFACTURES (1790).

49 *Lathrop v. Donohue*, 367 U.S. 820, 874 (1961) (dissenting opinion).

50 *Id.* at 843 (opinion of Brennan, J.).

51 *Ibid.*



spoke also for Mr. Justice Frankfurter, fully concurred.<sup>52</sup> As things now stand, we may take it that a clear majority of the Court approves the objectives of the integrated bar as constitutionally permissible goals for state policy.

Little need be said as to the relation between end and means. Voluntarism has failed in this area, as the Wisconsin court acknowledged in proclaiming its decision in favor of integration.<sup>53</sup> Obviously, then, the resort must be to some form of compelled cooperation, or, at least, to some form of compelled contribution of financial support. This could be accomplished by means of a tax levy, earmarked for that purpose. The integrated bar, with annual dues, really is no different.<sup>54</sup> The relationship of end to means becomes self-evident. Moreover, the Court has recognized the propriety of placing upon those whose activities give rise to special problems the burden of supporting the cost of dealing with these problems.<sup>55</sup> We come, then, to the question whether the impact upon individual interest is too great.

So far as the claimed interest in being a lone wolf is concerned, there is, after all, little impingement upon it by either the labor or the bar regulations. The compelled association amounts to no more than association in the payment of money and in an inscription upon membership rolls. The union member-by-compulsion need not attend meetings, hold office, or participate in "his" union's functions. Indeed, it has been held up as a shortcoming of modern day unionism that most of those who come to their membership voluntarily do none of these things.<sup>56</sup> Balanced against the trusteeship which the law imposes upon the organization, whether by interpretation of the statute<sup>57</sup> or upon analogy to the common law public utility status of virtual monopolies,<sup>58</sup> whatever sacrifice of individuality is involved seems infinitesimal indeed. When this small diminution of personal status is weighed in the constitutional scale against the public purposes, achievement of which is sought by the strengthening of collective negotiation, it is small wonder that it causes not the slightest joggle in the pans of the constitutional balance.

The introvert lawyer resisting integration has no better case. As the Supreme Court of Wisconsin pointed out when the *Lathrop* case was before it:

The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of \$15 per year<sup>59</sup>

52 367 U.S. at 861 (concurring opinion).

53 In re Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602, 603 (1956).

54 This point is made in *Lathrop* by Harlan, at 860, and by Whittaker, at 865. In effect, it is conceded by Black, at 877, his point being that the "tax" must not be devoted to advocacy in the social arena.

55 Noble State Bank v. Haskell, 219 U.S. 104 (1911); New York v. Squire, 145 U.S. 175 (1892); Charlotte, C. & A.R.R. Co. v. Gibbs, 142 U.S. 386 (1892).

56 See LENS, THE CRISIS OF AMERICAN LABOR 49 (1959).

57 Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

58 James v. Marins Corp., 25 Cal. 2d 721, 155 P.2d 329 (1945); Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343 (1945).

59 *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404, 408 (1960).

It is most unlikely that the Supreme Court will give to such an "airy nothing a local habitation and a name." We may take it that "compulsory unionism" and "compulsory bar association membership" in the attenuated form in which thus far they have been presented properly are free from the taints which lead to declarations of unconstitutionality.

Of course this does not mean that all aspects which institutions of this sort may take will be acceptable to the judges. I should suppose that too heavy burdens of participation in group affairs may not be laid upon those who are made members against their will in any organization. The days have long passed when one could be required to accept public office.<sup>60</sup> The armed forces remain as the outstanding form of continuing association on behalf of the public weal in which one may be compelled to take membership.<sup>61</sup> There are others, as the sustention of the compulsory welding of entrepreneurial activity known as the compulsory unitization of oil fields illustrates.<sup>62</sup> But instances of this sort are supported by public interests of extremely high order. It seems unlikely that compelled service in aid of union activities or of bar association work will be connected, in an immediately foreseeable future, with interests of such outstanding magnitude. Consequently, it may be assumed that the burden of substantial affirmative participation in the work of either unions or of bar organizations may not validly be laid upon reluctant shoulders. Under present conditions, the question probably is academic in any event.

#### 4. *Liberty of Thought*

"Dare to have a purpose true!" Thus continues the refrain. Mr. Justice Black, in his dissent in the *Lathrop* case, asserted "the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts. . . ."<sup>63</sup> Implicit in this phrasing is the notion that in some way bar integration restricts the intellectual operations of the individual lawyers. The point was not raised by Mr. Justice Douglas, unless, perhaps, it is contained in his statements that by the decision "we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades,"<sup>64</sup> and that "the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority."<sup>65</sup> It was not raised in his labor union opinions. Whether this is on the assumption that blue collars are surmounted by tougher minds than are white collars or is based upon some other consideration, we can but surmise.

One is tempted to return to this implication the short and impolite vernacular injunction: "Don't be silly!" One recalls Galileo's alleged murmur,

60 *State v. McEntyre*, 25 N.C. 171 (1842).

61 *Selective Draft Law Cases*, 245 U.S. 366 (1918). Of course, there is also the posse comitatus.

62 *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952); see Merrill, *The Legal Status of a Statutory Oil and Gas Production Unit*, 10 OKLA. L. REV. 249 (1957), for details of the degree of association involved.

63 *Lathrop v. Donohue*, 367 U.S. 820, 874 (1961) (dissenting opinion).

64 *Id.* at 884 (Douglas, J., dissenting).

65 *Id.* at 885.

*"Eppur si muove,"* after finishing his recantation, and the ancient judge's assertion that "the Devil himself knoweth not the heart of man." This is to say that no constitution is needed to guarantee freedom of thought. Certainly no judicial intervention is needed. We may put bounds upon expression of thought but we cannot bind thought itself.

There may be another side to this, however. Willard Hurst has commented upon the fact that the "size and internal discipline of great organizing institutions tend[s] in practice to make any but institutional norms irrelevant in large areas of life as criteria of action."<sup>66</sup> So great is the outcry in our current literature against the cult of conformity that one almost marks himself as a radical nonconformist if he contradicts it. We must admit, therefore, that what our associates proclaim as their thought tends to influence our own mental processes. May it not be said, then, that to throw one, against his will, into association with others is to impose bounds upon his liberty of thought?

To this consideration, the answer must be one of practicality rather than of theory. This group threat to free thought inheres in man's nature as a social animal. We cannot think of man outside of society. So long as he lives in society, he is subject to the impact of the ideas expressed by the majority of the group with which he is associated and to the tendency to conform to these expressions. He will yield or resist according to his own intellectual toughness and to his personal strength of character. Unless we disorganize society, we cannot relieve him from the strain of exposure to the thoughts of others. The most, then, that can be made out of this appeal to embrace freedom of thought within our constitutional liberties is that we shall not subject the individual unduly to the influence upon his thought processes which is exerted by the assertions of others.

In determining whether forced groupings of the sort under discussion involve this undue subjection, we must keep in mind the limited degree of association actually involved. If the forced member need not attend meetings, he certainly can be free from hearing the views there expressed. Equally is he left free to decline to read the literature which the group sends to its members. Therefore, he has in his own hands the keys to escape from such compulsion on his thought as might arise from hearing or reading the expressions of others. When we weigh the issues thus, they seem to indicate a result similar to that which we reached in considering the claim of a liberty to stand alone. The impact upon the individual is of little greater force than that which he encounters simply by being a member of society. The social advantages surely outweigh the very slight additional trammel set upon freedom of the mind. The attack from this direction upon compelled membership fails.

### 5. *Liberty of Expression*

"Dare to make it known!" Thus ends the refrain. Here we have liberty of speech and the press, or, more broadly and accurately, liberty of expression. This, indeed, is a fundamental, guaranteed against Congress, as it is, by

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66 HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 163 (1960).

the first amendment, on the petition of many of the states in their acts of ratification. It is of no less importance as guaranteed against the states as one of the liberties protected by the first section of the fourteenth amendment.

But analysis becomes important, particularly when we reflect that neither the union shop legislation nor the bar integration measures call upon those who are drafted into membership to give any affirmation of belief. The complaints that have been voiced are founded upon the fact that the groups in which membership is compelled do take public positions upon various issues. In some way, this is considered to be a violation of the individual's freedom of expression.

The simplest position is one given voice by Mr. Justice Douglas: "Joining is one method of expression."<sup>67</sup> Obviously, we cannot dissent from this statement, where joining is free and uncompelled. Joining the N.A.A.C.P. surely may be regarded as a method of affirmation in certain sections of the country.<sup>68</sup> In other parts of the polity, similar effect will attach to public adherence to the John Birch Society. It is quite different, however, when the association is not free and voluntary. No one would assume that every draftee thereby indicates approval of the foreign policy of the United States or of the employment of his unit in its aid. No more does forced membership in union or in bar groups indicate adherence of the member to the publicized views of the group. This is true even in the case of voluntary membership organizations. A few years ago when the ghost-dancing on behalf of the Bricker Amendment<sup>69</sup> had stampeded the House of Delegates of the American Bar Association into indorsement of that proposal, there were many members who opposed it. It may well be that in fact they constituted a majority of the whole. A great many were vocal in opposition. Others were silent. But comparatively few were impelled to resign from the Association because of their dissent from the organization's official stand. They recognized that the Association did not speak for them, and that intelligent outsiders would not confound the organizational expression with their own. Surely Mr. Justice Harlan is correct when he says that "we should pause before assuming that particular Bar members can sensibly hear their own voices when the State Bar speaks as an organization."<sup>70</sup> The concept of compelled affirmation of belief simply will not wash.

Another attempted approach to the concept of liberty of expression is the argument that compelled membership discourages or renders less effective the voicing of dissent to the organization's proposals. The latter proposition is in some ways simply a remodeling of the argument concerning compelled affirma-

67 *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (dissenting opinion).

68 *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

69 The aptness of the comparison between the ghost dancers and the Brickerites is emphasized by the comment that the ghost dance was practiced by the Indians "in the vain belief that it would restore them and their deceased ancestors to a fast-disappearing way of life." MILLER, *GHOST DANCE* vii (1959). On the ghost dance in a different area, see MARRIOTT, *THE TEN GRANDMOTHERS*, 196-205 (1945).

70 *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (concurring opinion). Immediately preceding this, Mr. Justice Harlan well said: "Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that 'everyone understands or should understand' that the views expressed are those 'of the State Bar as an entity separate and distinct from each individual.'" *Ibid.*

tion. Once we are agreed that forced membership does not express assent to the official statements of the organization, the contention of the diminished effectiveness of dissent loses its relevance. The very fact of expressed dissent constitutes a breach in the phalanx of group expression. Once more the contest over the Bricker Amendment has relevance. The dissidence of so many members of the American Bar Association effectively counteracted the indorsement of the proposal by its official governing body. This was recognized by the anguished protests of the Brickerite leaders against the expression of dissent. Mr. Justice Harlan properly cast scorn upon the "supposition . . . that the voice of a dissenter is less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in dissent to the recommendations of that group."<sup>71</sup> Milder forms of the "hampering" argument, as in suggestions that compelled dues reduce the dissident's ability to finance his expressions of opposition and correspondingly increase the resources available to publicize the organizational stand, are particularly vulnerable to the *de minimis* principle.

The "discouragement" argument may be a bit meatier. In specific cases, one whose opinion is not influenced by the views of the crowd still is reluctant to take a stand which he fears may be unpopular. This, however, is a phenomenon which permeates all society. It does not arise from the fact of formal membership taken under compulsion. The organizational position will be expressed, regardless of whether membership is voluntary, extending only to a portion of the general group, or is compelled and universal. In either case, the timid or the reticent will remain silent. The bold and the voluble will let their thoughts be known.

The simple truth is that the freedom of expression issue is completely irrelevant to the constitutional validity of compulsory organizational membership. There is no semblance of compulsion of expression in compelled membership. The real point at issue is the validity of exacting dues to be used, in whole or in part, to promote measures which the duespayer detests. This raises a question of economic due process: is it arbitrary and unreasonable to exact this man's money to promote objects which he opposes? The reference to freedom of expression clouds analysis by bringing in all the talk about the absolute nature of "First Amendment freedoms" which some find written in the Constitution,<sup>72</sup> or the view that "exceptional circumstances" must be shown to justify impingements on these interests.<sup>73</sup> Even those who do not agree that there is a "preferred place"<sup>74</sup> for freedom of expression still may agree that this freedom is entitled to high rank on the scale of values of a free society.<sup>75</sup> It therefore is disadvantageous to discuss what is merely a question of the proper disposition of compulsory dues in the guise of a supposed restriction upon liberty

<sup>71</sup> *Id.* at 856.

<sup>72</sup> *Lathrop v. Donohue*, 367 U.S. 820, 872 (1961) (Black, J., dissenting).

<sup>73</sup> *Id.* at 882 (Douglas, J., dissenting).

<sup>74</sup> *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>75</sup> "[T]he suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

of discussion. Let us hope that, in the future, this error will be avoided.<sup>76</sup>

#### 6. *Enforced Contribution to Abhorred Objectives*

Every governmentally sanctioned exaction is more or less distasteful to those who must pay it. But, as Mr. Justice Harlan observed in his concurring opinion in the *Lathrop* case, "a state taxpayer could [not] object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school."<sup>77</sup> The minority must yield to the declared public purpose.

The tax analogy is persuasive as to the integrated bar, which from its form of organization, purposes and objectives may be regarded as a type of governmental agency. It is less apt as applied to the labor union, however. Thus far, the union has not been entrusted with specific tasks to be accomplished for government. It functions merely to aid in the accomplishment of the public policy favoring collective bargaining where the majority of the employees desire that method of dealing with their employer. It might have been adequate therefore for Congress to have limited the nonmembers' contributions to their respective shares of the actual cost of collective bargaining, applying the so-called agency shop concept. Instead, it permitted a requirement of the full payment of normal "dues, fees and assessments." This indicates congressional approval of forced sharing in the expense of all normal union activities, of a nonpolitical nature. The *Hanson* decision<sup>78</sup> clearly establishes the validity of this means to the accomplishment of the legislative objective. Doubtless it was felt that Congress might well have thought the accounting task of separating collective bargaining costs from other legitimate union costs too burdensome in relation to the advantage of charging the nonjoiner with only his proportionate share of bargaining expense. What tipped the scale the other way in the eyes of the seven Justices who concurred in the *Street* case<sup>79</sup> in reading an implied prohibition of political expenditures? I think we may take it that it was quite as much a strong doubt as to the constitutionality of requiring contributions to such expenditures as it was a belief that Congress had intended to forbid them. Justices Black and Douglas made their own views quite clear in that respect. I think similar views must be ascribed to the other five, in view of the clarity with which Mr. Justice Frankfurter, joined by Mr. Justice Harlan, demonstrated that Congress really could have meant no such thing as the principal opinion assumes it to have intended.<sup>80</sup>

We may take it then as fairly indicated that the Court may not consider that "political" activity on behalf of candidates or of measures is a purpose for which funds exacted under compulsion of statute constitutionally may be used.

76 It is perhaps significant that the so-called "plurality opinion" in *Lathrop* emphasized that the case was concerned "only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." 367 U.S. at 828.

77 367 U.S. at 860. He presses the tax analogy again at 865. This seems to be the whole substance of Mr. Justice Whittaker's short concurrence on the same page.

78 *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225 (1956).

79 *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

80 *Id.* at 797 (dissenting opinion).

against the will of the contributors. This statement applies to the bar as well as to labor. Note the emphasis which Mr. Justice Harlan's concurring opinion in *Lathrop* places on "effort to improve the law in technical and non-controversial areas."<sup>81</sup> We must suppose this to mean "politically non-controversial" since some of the most acrid controversy known to man has raged over technical problems of legal procedure. Note also that the "plurality opinion" in *Lathrop* lays stress upon the predominantly nonpolitical character of the activities actually pursued by the integrated bar of Wisconsin.<sup>82</sup>

Nonetheless, the Court has been reluctant squarely to face the issue of constitutionality. It has limited the possibility of relief to those dissentients who make known their objection to particular "political" activities that have been undertaken and who can establish how much of their dues have been devoted to these activities.<sup>83</sup> The relief attainable remains uncertain. Five judges, one hesitantly, suggest alternatively: (1) an injunction against the expenditure, from the total budget set aside for advocative purposes, of the sum representing the proportionate part of that item attributable to the dues of the dissentient; (2) the restitution to the dissentient of that portion of his dues which was spent for the objectionable political activity.<sup>84</sup> Perhaps these are simply different aspects of the same general type of relief. The first method would be appropriate if suit were brought before expenditure. The second method would be the appropriate remedy if suit were delayed until after the expenditure had occurred. The opinion points out that other methods are not foreclosed, but it is a little difficult to determine what these might be, other than the sweeping prohibition of all collection of dues from dissentients so long as the prohibited expenditure exists, for which Mr. Justice Whittaker and Mr. Justice Black would have voted.<sup>85</sup> So long as the opinion of the Court in the *Street* case stands, it is doubtful whether either unions or integrated bars are likely to be successfully made defendants in actions brought in accordance with its suggested procedures.

The real significance of the two decisions lies much more in what was said and in what was not done than in what was done. The Court indicated its distaste for taking money, by compulsion, to be spent for the promotion of causes which the payer opposes. At the same time, it refrained from doing anything to interfere with the functioning of organizations selected to execute state and national purposes which the Court deemed constitutionally licit. Also,

81 367 U.S. at 863. The expression itself is taken by way of quotation from Judge Waterman, writing in *Dulles v. Johnson*, 273 F.2d 362, 367 (2d Cir. 1959). Of course, this emphasis may be overestimated, since Mr. Justice Harlan would have concurred with Mr. Justice Frankfurter to uphold the validity of using a compelled member's dues to advance political programs against the dues-payer's will. See *International Ass'n of Machinists v. Street*, 367 U.S. 740, 806-19 (1961) (dissenting opinion).

82 "Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, *without any reference to the political process.*" 367 U.S. at 843. (Emphasis added.)

83 *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

84 *International Ass'n of Machinists v. Street*, *supra* note 83, at 774-75.

85 *Id.* at 780 (Whittaker), and at 774-75 (Black).

however, it refrained from renunciation of future exercise of power to remedy abuses. In this there is a lesson and a warning which leaders of unions and of integrated bars will do well to heed. Ignoring the import and the undertones of Supreme Court opinions often shatters the judicial patience, leading the Court to break in upon practices with which it had been loath to interfere. This happened with respect to racially oriented covenants concerning the use of land.<sup>86</sup> It happened with respect to racial segregation in education.<sup>87</sup> And now it is happening with respect to the apportionment of representation in state legislatures.<sup>88</sup> If a majority of the Justices becomes convinced that unions and bar organizations are taking advantage of the procedural and other difficulties which these decisions throw in the pathways which dissentients must take in search of relief, in order to engage in "political" activity of all sorts in callous disregard of the position of individuals, particularly of individuals so numerous as to constitute substantial minorities, there may come a time when this majority will accept the views now held by Mr. Justice Black, by the recent Mr. Justice Whittaker, and, in respect to the organized bar, by Mr. Justice Douglas.

The question then arises, what should the organizations do to prevent this shift in position? For unions, the answer seems fairly obvious. Effective steps must be taken to divorce legislative and political promotion from the union dues. This now has become a legal duty, as to the rail unions. Their statute requires it, by judicial interpretation. However, the same result should follow as to unions achieving various forms of "union security" under the National Labor Relations Act in the states which do not enact right-to-work laws. The statutory provisions are sufficiently similar to those governing the *Street* decision to warrant like interpretive implication.<sup>89</sup> This divorce probably would have to involve more than the currently practiced organization of independent labor political organizations supported by voluntary contributions, over and above regular dues and assessments.<sup>90</sup> It likely will require that labor papers either cease to publish items giving publicity to various political activities and objectives, or that a separate subscription list, on a voluntary basis, be established for them. It certainly will require that funds into which membership fees may be traced shall not be used to contribute to the support in any way of political activities, political candidates, political groups or legislative objectives.

With respect to integrated bars, the problem seems somewhat simpler. Bar groups have not commonly engaged in the promotion of substantive legislative programs of a general nature. When they have done so, as in the case of the ill-starred Bricker Amendment, the results have not tended to encourage other ventures. What is immediately significant to bar organizations is the extent to which more modest programs may be affected.

We may take it that seven members of the present Supreme Court of the United States will concur in upholding the validity of an integrated bar. Mr.

86 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

87 *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1954).

88 *Baker v. Carr*, 369 U.S. 186 (1962).

89 61 Stat. 140 (1947), 29 U.S.C. §§ 157, 158 (a)(3) (1958).

90 See Fillenwarth, *Politics and Labor Unions*, 37 NOTRE DAME LAWYER 172, 180 (1961).



Justice Harlan and Mr. Justice Frankfurter definitely have expressed their opinion to that effect. The four who concurred in the so-called "plurality opinion" in *Lathrop* properly may be considered as favoring the general validity of bar integration. That opinion clearly differentiates between the compulsion of membership in the bar and financial support of its varied general activities on the one hand, and, on the other hand, the use of some part of the proceeds from bar dues to advocate and lobby for the adoption of legislation. It is significant that, after reciting the general nonlegislative activities of the Wisconsin bar, the plurality opinion states that these are so reasonably related to "improving the quality of the legal service available to the people of the State" that to promote them "is a legitimate end of state policy."<sup>91</sup> There follows the forthright declaration:

We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.<sup>92</sup>

Mr. Justice Black qualifies for inclusion in the group approving the integrated bar, aside from the question of using compelled dues in advancement of positions disapproved by a particular member, by virtue of his statement:

In saying all this, I do not mean to suggest that the Wisconsin State Bar does not provide many useful and entirely lawful services. Quite the contrary, the record indicates that this integrated bar association, like other bar associations both integrated and voluntary, does provide such services. But I think it clear that these aspects of the Wisconsin State Bar are quite beside the point so far as this case is concerned. For a State can certainly insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor. Thus, the power of a bar association to advocate legislation at the expense of those who oppose such legislation is wholly separable from any legitimate function of an involuntary bar association and, therefore, even for those who subscribe to the balancing test, there is nothing to balance against this invasion of constitutionally protected rights.<sup>93</sup>

This seems a clear admission that an "involuntary bar association" does have legitimate functions.

As a result, only Mr. Justice Douglas, of the present Supreme Court, appears opposed to the validity, in all aspects, of an integrated bar. Even he may not be quite so intransigent as most of his opinion might indicate. At one point

91 *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961).

92 *Ibid.*

93 *Id.* at 874-75 (dissenting opinion).

he stated: "The sole question is the extent of the power of a State over a lawyer who rebels at becoming a member of the integrated bar and paying dues to support activities that are offensive to him."<sup>94</sup> This term "activities" may be taken to mean only activities involving advocacy of legislation, which was the major, if not the only, point stressed by the appellant, or it might refer to all other sorts of activities. Certainly, however, his opening statement that "the question in the present case concerns the power of a State to compel lawyers to belong to a statewide bar association, the organization commonly referred to as the 'integrated bar,'"<sup>95</sup> contains no exceptions, and much of Mr. Justice Douglas' other language, already quoted, indicates a disapproval of the entire institution. Mr. Justice White, of course, may not presently be counted either way.

As to the study of problems relating to the improvement of the substantive law, and as to advocacy of the legislative adoption of the results of such studies, only the Frankfurter-Harlan opinion may be cited as squarely favoring it. The Wisconsin Supreme Court, in its decision, relied heavily upon the fact that, under the rule creating the State Bar of Wisconsin and under the latter's by-laws, the legislative advocacy embarked upon by the bar must be confined to matters related to "the administration of justice, court reform and legal practice."<sup>96</sup> It is not clear how much this expressed limitation influenced the positions of the various Justices of the Supreme Court of the United States. The plurality opinion did not mention it. The Harlan-Frankfurter opinion quoted it.<sup>97</sup> The Whittaker and the Black opinions took no formal account of it. The Douglas opinion mentioned it, followed by the statement: "It is difficult for me to see how the State can compel even that degree of subservience of the individual to the group."<sup>98</sup>

On the other hand, it is to be noted that the "plurality opinion" speaks of the announced function of the integrated bar as a forum for "discussion of . . . law reform"<sup>99</sup> and quotes the bar's rules of policy and procedure for legislative activity which, *inter alia*, provide that all sections and committees are expected to examine bills "that would make any changes in the substantive law, and keep the Board of Governors and the Executive Committee fully informed so that ill-advised bills can be opposed and meritorious bills can be supported."<sup>100</sup> Also it recites a list of matters on which the State Bar or its committees have taken positions, some of which involve substantive law solely and cannot be regarded as confined to matters of "the administration of justice, court reform, and legal practice."<sup>101</sup> The Harlan-Frankfurter opinion makes similar reference to the use of the bar as a means of recommending law reform of all sorts.<sup>102</sup>

The truth is that there are two distinct areas in which the lawyers can

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94 *Id.* at 878 (Douglas, J., dissenting).

95 *Id.* at 877.

96 *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404, 409 (1960).

97 *Lathrop v. Donohue*, 367 U.S. 820, 861 (1961) (concurring opinion).

98 *Id.* at 880 (dissenting opinion).

99 *Id.* at 829 (opinion of Brennan, J.).

100 *Id.* at 834, n.9.

101 *Id.* at 835-39.

102 *Id.* at 863 (concurring opinion).

operate: the area of legislation affecting "the administration of justice, court reform, and legal practice" and the area of substantive legislation in general.<sup>103</sup> Also, there are two methods of operation: active legislative advocacy or, on the other hand, study and recommendation for action without active advocacy. It may well be that in respect to matters in the first area the Supreme Court eventually will approve expenditure of funds for legislative advocacy, regardless of the dissent or objection of minority members, while, at the same time, it may feel that as to matters in the second area the state organized bar should confine itself to study and advice. It might be well for integrated bars to structure their machinery for dealing with studies of the law in action and for legislative recommendations and lobbying activity to conform to this suggested differentiation.

In another respect, due process may come to impose substantial limits on the activities of integrated bars as agencies for study and action in the realm of law improvement. It may be necessary to take steps to insure the approval of the officially adopted legislative program of the bar by a substantial majority of the membership, and to apprise the public of the exact division of opinion where the bar recommends rather than advocates.

The "plurality opinion" in the *Lathrop* case cites and quotes extracts from the statement of policy of the Wisconsin State Bar relating to legislative activity which are designed to insure that advocacy shall be confined to those matters about which there is substantial unanimity on the part of the Bar. If "it is obvious that the membership of the Bar is of a substantially divided opinion, the Board of Governors shall take no definite position." However, the Board, in such a case, may report its vote to the Legislature, as an indication of the state of its view.<sup>104</sup>

These provisions make substantially the distinction between legislative advocacy and indorsement or recommendation suggested in the preceding discussion. They also suggest the path that could be pursued to deal with this problem of confining legislative advocacy, even of matters affecting the administration of justice, to propositions about which there is a common consensus supported by most of the bar.

It is questionable whether either legislative programs or general recommendations should be promulgated by small governing boards, executive committees or the like. Probably they should emanate from bodies based so as to involve substantial representation of the bar as a whole.

<sup>103</sup> Compare the point made by Judge Waterman as to the qualification of a bar association for the exemption from federal estate tax, given only to bequests to benevolent corporations "no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation," 26 U.S.C. § 812(d):

Moreover, the legislative recommendations of the Associations, insofar as these recommendations do not involve matters the responsibility for which has been entrusted to the Associations by the Legislature, are designed to improve court procedure or to clarify some technical matter of substantive law. They are not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy. These two factors lead us to the conclusion that the recommendations of the Associations concerning impending legislation are not such as to cause the forfeiture of charitable status under Section 812(d)." *Dulles v. Johnson*, 273 F.2d 362, 367 (2d Cir. 1959).

<sup>104</sup> 367 U.S. at 834.

It might well be that for an item to become part of the legislative program, it should receive at least a 60 per cent affirmative vote from whatever body is assigned the adoptive function. For a mere recommendation, a majority vote would suffice. Publicity setting forth the exact vote pro and con, with respect both to legislative programs and to recommendations, would help to rebut the argument concerning regimentation and abridgment of free speech.

If greater assurance of representation of general bar sentiment is desired, provision might be made for a referendum of the membership on any item of legislative program — on petition of a sufficient number and distribution of the membership to prevent abuse.

It seems to me that safeguards along this line would answer effectively the arguments concerning regimentation and goose-stepping brigades. The Supreme Court, as presently constituted, seems disposed to consider favorably the public interest to be served by making the integrated bars into vehicles for study and report concerning matters of law reform. This function cannot be fulfilled effectively if dissentients are enabled to block proposals to which they are opposed by the threat of suits of one sort or another. It cannot be in the public interest to have a muzzled bar. Individual study and advocacy will not meet the need. In these days, substantial resources and pooled effort are essential to effective study and qualified draftsmanship. Lobbying is almost indispensable to a successful program of legislation. Once it is recognized that the issues involved relate not at all to liberty of expression in any of its forms, but rather to the old, familiar issue of how far the individual may be required to subordinate his material welfare to the public good, there should be little difficulty in demonstrating to the judges that the general interest in securing the informed and disinterested opinions of specially equipped minds on matters relating to the improvement of the law is, indeed, "most substantial." Against it, the comparatively slight drain upon the resources of the individual dissentient fades into insignificance. It is not to be expected that the Supreme Court lightly will strike down so important a public interest when it is made manifest that there is no issue of freedom of expression at stake.

On the other hand, the labor union's claim to use the dues exacted from unwilling members for the promotion of legislative programs rests upon no such general public interest. The unions have not been made into public agencies for law reform, even as to labor law. Their positions represent the reaction of the formulators to the question of what is in the best interests of the union members, or, at the widest, of labor as an element in society. It certainly cannot be contended that there is any violation of due process in prohibiting the use of funds, involuntarily exacted, for political ends. Consequently, it seems most likely that the course of decision will call more and more for a rather rigid separation of the dues exacted from unwilling members and the union's expenditures for legislative and political objectives. How to work out this separation, preserving the legitimate interest of union members in being able voluntarily to formulate legislative programs and to support them financially, presents a striking challenge to union statesmanship.